

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-6188

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JESSE B. STEPHENS, on behalf of
himself and all other persons
similarly situated,

Plaintiff-Appellant,

-against-

UNITED STATES POSTAL SERVICE;
E. THEODORE KLASSEN, in his
capacity as Postmaster General of
the United States; UNITED STATES
CIVIL SERVICE COMMISSION; and
ROBERT E. HAMPTON, in his capacity
as Chairman of the United States
Civil Service Commission,

Defendants-Appellees,

UNITED STATES OF AMERICA; and
ELMER B. STAATS, in his capacity
as Comptroller General of the
United States,

Defendants.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN
DISTRICT OF NEW YORK

REPLY BRIEF FOR APPELLANT

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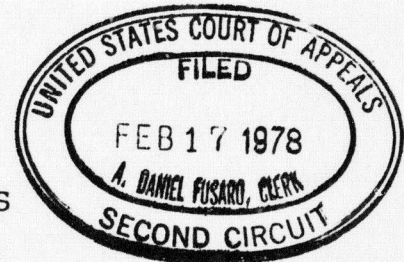


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UNITED STATES COURT OF APPEALS
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- - - - - x

ARGUMENT

POINT I

THE CIVIL SERVICE COMMISSION
WAS NOT A PARTY TO THE JUDGMENT
APPEALED TO THE COURT OF APPEALS
AND APPELLANT COULD NOT THEREFORE
HAVE RAISED THE ISSUE OF HIS RIGHT
TO AN ANNUITY.

The appellees' initial argument, that the doctrine of "law of the case" precluded Stephens from raising the issue of his right to an annuity in his Rule 60(b) motion, ignores, first, the fact that only the Postal Service was a party to the March 16, 1976 judgment (A-4), and second, the principle of law that only judgments of district courts can be appealed to the courts of appeals, even though a ruling has been given in the ~~court~~ opinion, and that if one is not a party to a judgment, he cannot be a party to an appeal. 28 U.S.C. §1291; Duke & Company, Inc. v. Foerester, 521 F.2d 1277, 1278, n. 4 (3 Cir. 1975); Ford Motor Co. v. Busam Motor Sales, Inc., 185 F.2d 531, 533 (6 Cir. 1950); cf. Armstrong v. New La Paz Gold Mining Co., 107 F.2d 453, 454 (9 Cir. 1939).

The Postal Service being the only party to the judgment, the only appealable issue was the finding that Stephens was responsible for the mail thefts. The Civil Service Commission, not the Postal Service, was the party vested with the power to decide whether to give Stephens an annuity or a lump-sum retirement credit.

In this court's recent pronouncement on what the law of the case is, U.S. v. Cirami, 563 F.2d 26, 32-3 (2 Cir. 1977), it stated:

However, from the proposition that the trial court must adhere to the decision and mandate of the appellate court there is the corollary that upon remand the trial court may consider matters not expressly or implicitly part of the decision of the court of appeals. Gulf Coast Building & Supply Co. v. International Bhd. of Electrical Workers, Local No. 480, 460 F.2d 105, 107 (5th Cir. 1972). This is true also at a later stage in the litigation where the case is again before the trial court not on remand but, for example, on a new motion to vacate the judgment.

Id., at 33.

The relief requested in the Rule 60(b) motion is not encompassed by this court's decision and would not be inconsistent with it. The part of the decision that Stephens was entitled to a judgment against the Postal Service for \$3,074 was arrived at by mathematical computation involving the value of each article of mail.

Respectfully submitted

Dated: Bronx, N.Y.
February 14, 1978

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Ian F. Feldman, of counsel

AFFIDAVIT OF SERVICE
BY MAIL

STATE OF NEW YORK
BRONX COUNTY

The undersigned, being sworn deposes and says that I am not a party to this action, am over 18 years of age and reside at 205 West 22nd Street, New York, New York 10011.

On 14th day of February, 1978, I served the annexed upon Robert B. Fiske Jr., United States Attorney for the Southern District of New York, attorney for defendant, at One St. Andrew's Plaza, New York, New York 10007, the address designated by the attorney for that purpose, by depositing a true copy enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me on this
14th day of February, 1978.

IAN F. FELDMAN
Notary Public, State of New York
No. 60-1185600
Qualified in Westchester County
Term Expires March 30, 1979

Ian F. Feldman

Nereida Negron
NEREIDA NEGRON